Application for leave to appeal, on the grounds of disparity as concerns the royal court having erred in distinguishing the role of the appellant and their co-defendant and imposing different sentences.

[2021]GCA064

GUERNSEY COURT OF APPEAL
(Criminal Division)
Case No. 498

8 December 2021

Before: James McNeill QC, President,
Lord Anderson of Ipswich KBE QC; and
Timothy John Le Cocq QC, Bailiff of Jersey

Between:

Hannah Michelle Willey **Appellant**

-And-

Law Officers of the Crown **Respondent**

Advocate Liam Roffey for the Appellant
Crown Advocate Christopher Dunford for the Respondent

JUDGMENT OF THE COURT

Le Cocq, JA.

Introduction

1. This is the judgment of the court on an application for leave to appeal by Hannah Michelle Willey ("the Appellant") against a sentence passed on her by the Royal Court (Full Court: John Russell Finch Esq OBE, Lieutenant Bailiff Presiding with Jurats Le Pelley, Hooley, Girard, Hodgetts, Morris, Wyatt, Crisp) on 16th October 2020.

2. On that date the Appellant appeared before the Royal Court together with a co-defendant, Karli Rae Wellington ("Ms Wellington"). There were four counts on the indictment but only two were laid against the Appellant and Ms Wellington jointly. They were:

    (i) First Count: Being knowingly concerned in the fraudulent evasion of the prohibition on the importation of cocaine and MDMA, both Class A controlled drugs, in contravention of Section 2(1)(a) of the Misuse of Drugs (Bailiwick of Guernsey) Law, 1974 as amended; and

(ii) Second Count: Being knowingly concerned in the fraudulent evasion of the prohibition on the importation of cannabis resin, a Class B controlled drug, in contravention of Section 2(1)(a) of the Misuse of Drugs (Bailiwick of Guernsey) Law, 1974 as amended.

3. The quantity and value of the drugs that formed the subject matter of the First Count, was 1120.1 grams of cocaine, some mixed with MDMA, which has a street value in Guernsey if sold as cocaine between £112,019 - £168,015. This was, we are informed, the largest quantity imported into Guernsey that has been before the Royal Court for sentencing.

4. The Appellant was also charged with a further offence, the Fourth Count on the indictment, namely failure to disclose information contrary to sections 46 and 49(1) of the Regulation of Investigatory Powers (Bailiwick of Guernsey) Law 2003 as amended in as much as she failed to disclose information required by a Notice issue to her under Section 46 of that Law within the requisite period. This related to her refusal after notice to give the PIN to allow access to her phone.

5. The sentences imposed by the Royal Court were so far as is relevant to this appeal as follows:

(a) With regard to the First Count, the Appellant was sentenced to 10 years and 6 months imprisonment and Ms Wellington to 8 years and 6 months imprisonment;

(b) With regard to the Second Count, the Appellant was sentenced to 4 years imprisonment concurrent and Ms Wellington to 4 years imprisonment concurrent; and

(c) With regard to the Fourth Count, the Appellant was sentenced to 6 months imprisonment consecutive.

6. On 2nd November 2020 the Appellant sought leave to appeal from McMahon, Bailiff, against the sentences imposed on her on the First and Second Counts (but not the Fourth Count) as being manifestly excessive on a number of grounds which included a review of the guidelines found in Richards [2002] GLR 247 and the disparity between the sentences imposed on the Appellant and Ms Wellington on the First Count. The learned Bailiff refused leave.

7. The Appellant renews her application for leave to appeal to this court but has now restricted her application to the sentence imposed on the First Count, on the grounds of disparity. That ground states:

> ***"The Royal Court erred in distinguishing the role of Miss Willey and her co-defendant Karli Wellington, and imposing different sentences."***

8. The essence of the Appellant's argument before this Court is that there was no material difference between her and Ms Wellington in the roles undertaken by them when committing the importation offences. There should accordingly have been no difference in sentence.

9. An initial issue arose for our determination. Counsel for the Appellant sought a copy of the Probation Report prepared for Ms Wellington. This was justified, so it was argued, on the basis that if the Probation Report contained any material that might be said to justify the disparity in sentence between the Appellant and Ms Wellington then Counsel for the Appellant should be aware of it so that he would be able to address it.

10. The argument against that course, which to our mind would normally be determinative of this question, is that there is an important public interest to be protected in maintaining the privacy and confidentiality of a Probation Report. Such reports often contain highly sensitive personal

information and offer invaluable assistance to the Court in deciding upon sentence. It is essential that the subject of the report is able to speak openly and freely with the Probation Officer without concern that the report will enter the public domain, be available to other parties in the case, or circulated more widely than to the sentencing court. It would be highly unusual, if not in our experience unprecedented, to disclose such reports to co-defendants and certainly not to do so without the leave of the subject of the report. No such leave has been forthcoming in this case.

11. The way we have resolved to deal with this issue it is to read the Probation Report relating to Ms Wellington and determine for ourselves whether it contains material that might distinguish between Ms Wellington and the Appellant for sentencing purposes. This means that we will inevitably be aware of information relating to Ms Wellington that is not known to the Appellant or her Counsel but that is no different to the situation that existed in the Royal Court and is an inevitable consequence of balancing the requirements of disclosure and the public interest as we have identified it above. We do not propose to discuss the contents of Ms Wellington's Probation Report but we can say that there is nothing in that report that would in our judgment have changed Advocate Roffey's presentation of the Appellant's case.

Legal Principles

12. There does not appear to be any difference between the parties as to the principles that apply in assessing the role of a defendant in drug sentencing or indeed in approaching any argument relating to disparity.

13. As to the former, in Richards (above), at paragraph 8 of the judgment, the Court stated that the determination of a starting point for the purposes of sentence was to be taken as *"the appropriate sentence for the offence after a full trial and before any mitigation is taken into account"*. The Court, also at paragraph 8 went on to say:

> ***"The starting point has to be determined primarily by considering two factors, namely the quantity of the drugs and the involvement or role of the defendant in the commission of the offence."***

14. As to the correct approach to a disparity argument this Court in Barras, Watt & Orchard v Law Officers of the Crown 4 October 2021, at paragraph 71 said:

> ***"The test to be applied in relation to any disparity argument is an exacting one. It was identified by the English Court of Appeal in R v Fawcett (1983) 5 Cr App (S) 158. In that case it was held that where an offender had received a sentence which itself was not objectionable but, for no apparent reason, was more severe than that of his co-accused, the Court of Appeal could intervene if the disparity was serious. In the course of giving the judgment of the Court, Lawton LJ said that the question to be asked is:***
>
> > ***"…… Would right-thinking members of the public with full knowledge of all the relevant facts and circumstances, learning of this sentence consider that something had gone wrong with the administration of justice?".***

15. We were also reminded of the principles that we apply in considering an appeal against sentence. We were referred to Blackstone's Criminal Practice 2022 (paragraph D26.52) and the case of Gumbs (1927) 19 Cr App R 74, in which Lord Hewart LCJ stated:

> ***"….this court never interferes with the discretion of the court below merely on the ground that this court might have passed a somewhat different sentence; for this court to revise a sentence there must be some error in principle……"***

16. In the same volume (paragraph D26.53) the following appears:

> ***"That a sentence passed is "manifestly excessive" is the basis that is most commonly used in the modern appeal process. An appeal will succeed only if the sentence was excessive in the sense of being outside the appropriate range for the offence and the offender in question, as opposed to merely being more than the Court of Appeal itself would have passed……"***

17. These principles are well known and apply to this appeal as to others.

Observations of the Sentencing Court

18. In its sentencing remarks the Royal Court reflected the fact that both the Appellant and Ms Wellington were of similar ages and both of previously good character. The court characterised the case in the following terms:

> ***"The essence of the case is that you were both couriers, driving a car on which this very considerable consignment of drugs was concealed, from the UK to Guernsey, and planning to go to Happy Landings to meet the persons who would take possession of it."***

19. The Court, after making reference to the nature and value of the drugs, made the following observations:

> ***"…..Originally you were told to go to the Airport car park to recover a car, previously brought here by the first defendant and another person."***

And:

> ***"We note the second defendant (Miss Wellington) provided the code to access her phone but the first defendant (the Appellant) did not. Fortunately, high level analysis forced access to it. This showed that the second defendant (Miss Wellington) had been recruited at a late stage to assist."***

20. The Court went on to refer to the fact that the Defendants had the benefit of early guilty pleas which were entered at the first opportunity.

21. The Court then reflected that the appropriate band for sentencing Class A drugs in powder form had a starting point for over 400 grams of 14 years imprisonment and upwards which is not in dispute. Given the size of the importation involved, the sentencing Court identified for the Class A drugs that a starting point of 18 years was appropriate but, given that there was also an importation of a substantial amount of Class B drugs, assessed the overall starting point as one of 20 years imprisonment.

22. The sentencing Court then went on to say:

> ***"……to your credit, we give this in full; we have an early guilty plea and your previous good characters and we note your personal circumstances. We have considered the Probation Reports and the submissions of your able advocates. We stress, as we have to from time to time, that sentencing is not an exercise carried out in the interests of defendants and as our Court of Appeal has said, "pressure" is not mitigation and it is wrong to add a category for it short of the legal defence of duress."***

23. Then the Court said:

> ***"Taking everything we have heard into account, the two factors mentioned earlier weigh in your favour and we give an enhanced discount. We are bound to say that although the evidence was compelling, you have nevertheless saved valuable Court time by your pleas. All relevant matters have been taken into account when we consider the appropriate discount which we assess on all the facts here, erring on the merciful side, as noticeably over one third and going in the region of one half."***

24. In passing sentence the Royal Court noted that both the Appellant and Ms Wellington had played, as couriers, a critical role in a *"huge attempted importation*" and noted:

> ***"We note Miss Wellington had a lower, to an extent, level of involvement on the facts, and appeared at a later stage without apparently any payment."***

The Prosecution's Outline case

25. In addition to the matters mentioned by the sentencing court the prosecution in its outline case gave further information about the phone records from which it was apparent that the larger part of the arrangements were made between the Appellant and the organiser of the importation. It was further clear that the Appellant was expecting to receive payment, namely, £5000 for her part in the importation and that Ms Wellington was not expecting to receive any payment. The Crown accepted that as indeed did the Royal Court.

26. We observe that it was stated in open court during the course of her mitigation that Ms Wellington had a "low likelihood" of re-offending. It is also the case that the Appellant was assessed as having a "medium likelihood" of general re-offending.

The Appellant's case

27. The Appellant contends that there was no distinction between her involvement and that of Ms Wellington. In essence the Appellant argues that:

    a. They were both couriers;
    b. Although the Appellant had driven the vehicle off the boat Ms Wellington had driven the vehicle during large parts of the journey and the identity of who was driving was irrelevant;
    c. Both made similar misrepresentations on arriving in Guernsey;
    d. The intended actions post arrival were identical;
    e. Whilst there was a larger volume of communication between the organiser and the Appellant there was nonetheless communication between the organiser and Ms Wellington. The volume of messages was irrelevant;
    f. The timing of recruitment was irrelevant;
    g. The evidence suggested that Ms Wellington would in fact have received £4000 from her involvement and that the Appellant would not have received the benefit of her £5000 which would have been taken from her by her abusive partner, of whom she was in fear, to pay for his drugs habit. In effect, the Appellant was coerced.

28. The Appellant goes on to point to her personal mitigation including her history of mental health problems including a diagnosis of Bipolar and of emotional personality disorder. She had the benefit of good references.

29. It is further argued that the fact that Ms Wellington had produced the PIN for her phone when requested and the Appellant had refused to do so should be disregarded as a distinction between them as the Appellant had already received a separate penalty for that refusal.

Discussion and Decision

30. We start by considering whether or not the sentence imposed on the Appellant could be considered, in the words of Barras (above), as "objectionable".

31. It was not argued before us that the sentence imposed on the Appellant was wrong in principle. The guideline case of Richards has not been challenged before us and although that case simply states that for over 400 grams of Class A drugs in powder form a starting point of 14 years imprisonment and upwards was indicated, in the light of the fact that this was an importation at almost 3 times that level and involved an additional importation of a second drug, a starting point of 20 years is not to our mind objectionable in any way.

32. The general approach of the sentencing Court in assessing a starting point for the Appellant cannot be faulted nor could it be said that the Court applied a less than generous discount by way of available mitigation. The discount in total, from a starting point of 20 years, amounted for the Appellant to over 40%. In our judgment the sentence imposed was not objectionable.

33. We now turn to consider whether right thinking members of the public with full knowledge of all the relevant facts and circumstances, learning of this sentence and the difference between the Appellant and Ms Wellington, would consider that something had gone wrong in the administration of justice.

34. We accept that the difference between the sentence imposed on the Appellant and her co-accused Ms Wellington was significant.

35. The Royal Court, as we have already stated, made reference to the lesser role played by Ms Wellington and clearly determined, as must be correct, that that should attract a lower sentence. Whereas the involvement of both the Appellant and Ms Wellington might be taken to be the same in that they both acted as couriers, it was open, in our judgment, for the Royal Court to take into account the factors that it mentioned as mitigating circumstances applicable to Ms Wellington alone. We observe that it appears that the Appellant had been involved in bringing a Renault motor vehicle over to Guernsey on an earlier occasion and was initially going to collect it, which suggests a longer involvement overall and could certainly have informed the Royal Court's thinking. It may have been open to the Royal Court to adjust the starting point for Ms Wellington and indeed in our judgment that may have been a clearer way to proceed. However, the Royal Court was entitled to take into account the factors that it did.

36. It was suggested to us in submissions that as the Appellant and Ms Wellington were charged on a joint enterprise basis they should be sentenced as such. We do not agree. Joint enterprise relates to collective responsibility of co-defendants for the commission of an offence, it has nothing to say about culpability of individuals for the purposes of sentence nor does it in some way restrict the approach of the sentencing court.

37. We do think that there was a distinction of significance between the payment arrangements with regard to the Appellant and Ms Wellington. It is not open to us to disagree with the Royal Court that Ms Wellington was not to receive any payment for her role. That suggestion was contained in a communication between the organiser and the Appellant as part of a discussion about the Appellant's remuneration. Ms Wellington denied that she was to receive any payment. The Crown accepted that, and the Royal Court sentenced her on that basis.

38. The Appellant was, however, to receive £5000. Much was made of personal circumstances and the fact that she was coerced into participation by an abusive partner with a drugs habit who would have used the money to purchase drugs. We accept that such may well have been the case; but coercion is a regrettable but all too common feature for cases of this nature and for those involved in this pernicious and ugly trade and can seldom be taken to be a mitigating factor. In the eyes of the law, the Appellant committed this crime to secure a substantial advantage for herself albeit that advantage was to pacify a violent partner.

39. In Law Officers v Mather and Cooper in 1999, the Court of Appeal indicated at 7F that:

> ***"If the Courts were willing to accept that those who felt compelled by threats to assist drugs dealers falling short of the quality of duress necessary to afford a defence, they would be adding a new category to the single group whose membership automatically results in a reduction of sentence. In our view it would be wrong to add any such category."***

And, at 8E:

> ***"Leniency by Courts to reflect mitigation of pressure or dependency would, in our view, inevitably result in dealers using the services of those susceptible to threats or blandishments more frequently than at present and would tend to increase rather than to decrease the availability of drugs within the Bailiwick."***

This latter excerpt was referred to more recently by McMahon, Deputy Bailiff, (as he then was) In Law Officers v Easton [2019] GRC030 and in our judgment that approach remains valid today.

40. Further, whilst we agree that the Appellant does not fall to be further penalised by characterising her refusal to provide a PIN as an aggravating feature as she has received an additional penalty, nonetheless the fact that Ms Wellington did provide her PIN immediately might properly be considered as a mitigating factor for her. She was materially more cooperative than the Appellant. The Appellant received the additional penalty for a further and distinct offence by refusing after notice to provide her PIN.

41. Considering all the material that was before the Royal Court we are satisfied that the sentence imposed on the Appellant was appropriate. As we have noted above, there were material distinguishing features for mitigation applicable to Ms Wellington and the Royal Court clearly was of the view that significant weight ought to be applied to them. In our judgment right-thinking members of the public with full knowledge of all the relevant facts and circumstances, learning of this sentence would not consider that the distinction in custodial sentence as between the two indicated necessarily that something had gone wrong with the administration of justice.

42. In the circumstances we refuse leave to appeal.